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# In the Supreme Court of the United States

OCTOBER TERM, 1968

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CITY OF CHICAGO, ET AL.,

*Appellants,*

vs.

UNITED STATES OF AMERICA, ET AL.,

*Appellees.*

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On Appeal From the United States District Court for the Northern District of Illinois

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## MOTION BY APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY TO AFFIRM

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# In the
# Supreme Court of the United States

OCTOBER TERM, 1968

## No. 1363

**CITY OF CHICAGO, ET AL.,**

*Appellants,*

vs.

**UNITED STATES OF AMERICA, ET AL.,**

*Appellees.*

On Appeal From the United States District Court for the Northern District of Illinois

## MOTION BY APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY TO AFFIRM

Now comes Chicago and Eastern Illinois Railroad Company (C.&E.I.), one of the appellees, and pursuant to Rule 16 of this Court, respectfully moves the Court to affirm the judgment of the trial court in this cause, on the ground that the questions presented by the appeal are so insubstantial as not to require further argument, in support of which motion appellee submits the following brief.

## BRIEF OF APPELLEE CHICAGO AND EASTERN ILLINOIS RAILROAD COMPANY IN SUPPORT OF MOTION TO AFFIRM

*May It Please The Court:*

The appeal seeks to have this Court recognize a right of objectors to judicial review of the discontinuance of trains undertaken by rail carriers pursuant to Section 13a(1) of the Interstate Commerce Act (49 U.S.C. §13a(1)).

On August 31, 1967, the Chicago and Eastern Illinois Railroad Company (C.&E.I.) filed with the Interstate Commerce Commission (Commission) a notice that the C.&E.I. intended to discontinue its trains Nos. 93 and 94 between Chicago, Illinois, and Evansville, Indiana. The Commission made an investigation and then terminated its investigation without invoking its discretionary authority under Section 13a(1) to require continued operation of the trains for a one-year period.

The trains were discontinued. Appellants then filed an action in the United States District Court for the Northern District of Illinois, seeking a court order requiring the C.&E.I. to reinstate the trains. Appellants claimed that they were seeking judicial review from the order of the Commission discontinuing its investigation. The three-judge court convened to hear the case properly dismissed it for lack of jurisdiction, holding that the discontinuance of the trains resulted, not from any action by the Commission, but from the action of the C.&E.I. pursuant to the authority granted railroads by Section 13a(1)—an action which it had no jurisdiction to review. *City of Chicago* v.

*United States of America*, 294 F. Supp. 1103 (N.D. Ill. 1969).* We adopt the statement of the case and the persuasive reasoning contained in the district court's opinion.

The judgment of the district court should be affirmed because the court's opinion espouses the only construction of Section 13a(1) which is consistent with the language of the statute, the legislative purpose for its enactment, and the decision of this Court in *Bergen County* v. *United States*, 359 U.S. 27 (1959).**

*The Language and Statutory Scheme of Section 13a.*

Section 13a, enacted in 1958, is divided into two subsections: 13a(1), which covers interstate trains and is therefore applicable to this case; and 13a(2), which relates to the discontinuance of trains operating within a single state.

Section 13a(1) provides that a carrier which operates an interstate train may discontinue the operation of that train by filing a notice of the proposed discontinuance with the Commission at least 30 days in advance of the effective date of the discontinuance. The statute then unequivocally states:

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* At the same time, the three-judge court dismissed a similar case involving the Louisville & Nashville Railroad Company (L&N) on identical grounds, *Tennessee Public Service Commission* v. *United States*, 294 F. Supp. 1106 (N.D. Ill. 1969), now pending before this Court, *sub nom. City of Chicago* v. *United States, et al.*, No. 1364.

** Affirming, *per curiam*, *State of New Jersey* v. *United States*, 168 F. Supp. 324 (D. N.J. 1958).

> "The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any state, or the decision or order of, or the pendency of any proceeding before, any court or state authority to the contrary notwithstanding."

In other words, the statute confers upon the carrier filing the prescribed notice with the Commission absolute authority to discontinue the train service which is the subject of the notice, except to the extent that the Commission affirmatively intervenes by exercise of the limited discretionary powers granted to it under §13a(1).

Under §13(a)1 the Commission is given authority during the 30-day notice period to commence an investigation of the proposed discontinuance either upon complaint or upon its own initiative. The Commission may require the carrier to continue operation of the train during such investigation, but only for a maximum period of four months. After hearings conducted in the course of the investigation, the Commission may require the continuance or restoration of operation of the train for a maximum period of one year. Certain findings must accompany any order requiring continued train service. If the Commission issues such an order, then at the end of the year, the carrier may again invoke the provisions of §13a(1) by filing a notice as before.

If the Commission decides not to commence an investigation or terminates its investigation without ordering continued operation of the train (the situation presented in the case at bar), the discontinuance of the train takes effect on the authority of the provision of §13a(1) quoted above without the requirement of any affirmative action or approval by the Commission.

These provisions of §13a(1) differ significantly from those of the simultaneously enacted §13a(2), dealing with trains operating within a single state. Section 13a(2) contains no provisions for automatic discontinuance of a train in the absence of intervention by the Commission. Instead, discontinuance in §13a(2) cases can be effected only upon the authority of an express Commission order authorizing the discontinuance, and such an order may be entered only after full hearings and upon the making of certain findings specified in the statute.

In Section 13a(1), in contrast to Section 13a(2), Congress deliberately authorized the discontinuance of interstate trains by unilateral action of the railroads, subject to discretionary and carefully limited power in the Commission to delay these discontinuances. Acceptance of appellants' arguments would ignore the language of §13a(1) and the vital differences between the provisions of §13a(1) and §13a(2), and would make §13a(1) discontinuances dependdent upon Commission approval, as in the case of those under §13a(2). This would amount to a rewriting of the entire statute.

*Congress Enacted §13a(1) to Provide An Expeditious Method For Railroads to Discontinue Unneeded and Unprofitable Interstate Trains—Appellants Would Frustrate That Congressional Purpose.*

Section 13a(1) is obviously an unusual statute. Its legislative history explains the purpose behind its particular provisions and also answers appellants' complaints of "unfairness."

Prior to the enactment of §13a in 1958, the Commission did not have any jurisdiction over the discontinuance of

individual trains, unless the discontinuance amounted to an "abandonment" of an entire railroad line. Discontinuance was under the jurisdiction of the various state regulatory commissions. Therefore, trains operating in more than one jurisdiction were subject to the frequently conflicting orders of a number of state commissions. As a result of changes in public traffic patterns and habits, many trains operated at substantial, continuous, out-of-pocket losses. Experience had demonstrated that where these outdated trains operated across state lines the carriers could not obtain adequate or prompt redress from state commissions. Inability to discontinue unneeded trains had created a crisis which threatened the economic health of the railroads and frustrated national transportation policy. It is clear from the legislative history that §13a(1) was adopted by Congress to remedy this problem and to provide carriers with a prompt and effective method of discontinuing interstate trains which were unneeded and a burden to the carrier, at the same time reserving to the Interstate Commerce Commission limited discretionary power to delay the discontinuance for specified, short periods of time if the public interest required that action. *Conference Report on the Transportation Act of 1958,* 1958 U.S. Code, Cong. & Admin. News, 3482, 3486-3487. See *City of Chicago* v. *United States,* 294 F. Supp. 1103, 1104-05 (N.D. Ill. 1969); *State of Vermont* v. *Boston and Maine Corp.,* 269 F. Supp. 80, 84 (D. Vt. 1967); *City of Williamsport* v. *United States,* 282 F. Supp. 46, 48 (N.D. Pa. 1968); *People of the State of California* v. *United States,* 258 F. Supp. 950, 953-54 (S.D. Calif. 1966).

The provisions of Section 13a(1) implement the legislative purpose of eliminating delays and red tape in the discontinuance of interstate trains. A discontinuance takes

effect within five months after notice, unless the Commission affirmatively rules, on the merits, that the public interest requires continued operation of the train. Even such an order on the merits is effective for only one year, after which the carrier may start the process again.

But the prompt remedy for distressed railroads intended by the authors of §13a(1) would be completely frustrated by the acceptance of appellants' claims to a right of judicial review and by approval of the procedures they have followed in No. 1364 and other such cases. Typically, immediately after the Commission discontinues its investigation, the opponents of a discontinuance file suit and seek a temporary restraining order requiring continued operation of the train. If a right to judicial review is recognized, a district court is likely to be persuaded by an argument in favor of "maintaining the status quo" by injunction until the matter can be heard on the merits. There then follows: the filing and disposition of the opponents' petition for rehearing before the Commission; completion of the pleadings in Court; action on preliminary motions; filing of extensive briefs on the merits; and, finally, hearing and decision by the three-judge court. In No. 1364, which was argued together with this case in the District Court, more than nine months passed between the carrier's notice of intention to discontinue train service and the actual discontinuance of the train upon the dissolution of the district court's temporary restraining order. Indeed, if the District Court had proceeded to the merits, instead of dismissing the action for lack of jurisdiction, the train would still be operating under the restraining

order (more than a year after the filing of the notice of discontinuance) without any determination on the merits.*

Acceptance of appellants' theories would transform a statute which permits only a five-month delay in a discontinuance, in the absence of a decision on the merits requiring continued service, into a procedure which sanctions delays of 1 to 1½ years, even though both the Commission and the three-judge court ultimately determine that the discontinuance is proper. Such a transformation can only be described as a frustration of the Congressional purpose.

Appellants complain of the supposed "unfairness" of a law permitting the carrier to appeal from an order requiring continued train service but forbidding judicial review of a discontinuance. However, it is obvious, from the language of Section 13a(1), that the statute purposely provides different treatment for the rail carrier seeking a discontinuance and persons objecting to the discontinuance. The reason is obvious from our examination of the legislative purpose behind Section 13a(1). Congress sought to provide a method for accomplishing discontinuance of unneeded and burdensome interstate trains, without undue delay, and yet safeguarding the rights of the public. Congress solved this problem by the procedure set forth in Section 13a(1): discontinuance at the option of the car-

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* This is no isolated instance. See also *City of Williamsport* v. *United States*, 273 F.Supp. 899 (M.D. Pa. 1967), 282 F.Supp. 46 (M.D. Pa. 1968) (Notice of discontinuance—January, 1967, temporary restraining order issued—May, 1967, complaint dismissed on the merits—March, 1968. There is no indication in the opinion that the restraining order was dissolved prior to March, 1968.)

*City of Chicago* v. *United States*, No. 68 C 2184 (N.D. Ill. 1969) (Notice of discontinuance—June 13-14, 1968, temporary restraining order issued—November 15, 1968, Commission decision affirmed and restraining order dissolved—June 2, 1969.)

rier reserving to the Commission discretionary authority to intervene to protect the public interest, but limiting the Commission's authority to short, specified time periods. Congress did not act unreasonably in affording judicial review to railroads who are compelled by Commission order to continue unprofitable passenger service, while entrusting the interests of municipalities and other objectors to the dedicated and expert personnel of the Commission.

*The Only Pertinent Decision of this Court Supports Appellee's Position.*

The district court's decision is supported by this Court's holding in *Bergen County* v. *United States*, 359 U.S. 27 (1959),* which rejected a claimed right to judicial review of a train discontinuation under Section 13a(1).

In that case a carrier filed notice of the discontinuance of interstate ferry service pursuant to the provisions of Section 13a(1). The Commission received a number of complaints, but declined to commence an investigation into the discontinuance. Thereafter, the State of New Jersey and the New Jersey Board of Public Utility Commissioners brought an action to set aside the Commission's "order" declining to commence an investigation, praying that the Commission be directed to investigate and make findings and that ferry service be restored in the interim. The plaintiffs, like appellants here, sought judicial review under Section 1336(a) of the Judicial Code and under the Administrative Procedure Act. In short, the factual situation and jurisdictional contentions in *State of New Jersey* v. *United States* are indistinguishable from those in the case at bar, with the single exception that the Com-

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* Affirming *per curiam State of New Jersey* v. *United States*, 168 F. Supp. 324 (D. N.J. 1958).

mission in that case declined to make an investigation, while in this case the Commission made an investigation but then terminated it and refused to require continued operation of the trains.

In *State of New Jersey* v. *United States,* the District Court emphatically rejected all of the contentions of the plaintiffs in that case, sustaining the constitutionality of Section 13a(1), and holding that the Federal Courts had no jurisdiction to review the discontinuance or the Commission's refusal to investigate it. With respect to the claim that jurisdiction existed under Section 1336(a) of the Judicial Code, the Court stated (168 F. Supp. at 328-29):

> "We find no jurisdiction under 28 U.S.C. §1336 (1952), because the action is not one to 'enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission.' On the contrary, the plaintiffs complain of the refusal of the Commission to act, i.e., 'to enter upon an investigation of the complaint' of the plaintiffs. No 'order' of the Commission is here complained of. Its written notice that it would not investigate the complaint does not constitute such action as is reviewable under §1336, supra . . . ."

> "The notice given by the Commission in the present case by way of response to the plaintiffs' complaint was nothing other than an announcement that the Commission intended to take no action with respect to the railroad's notice of intention to discontinue the ferries. . . . . The Act is self-implementing insofar as it affords authorization to a carrier to discontinue service. No provision is made for any action of the Commission to render such authorization effective. The efficacy of the congressional authorization is in no respect dependent upon any action on the part of the Commission. Obviously, therefore, the provisions of 28 U.S.C. §1336 do not clothe us with jurisdiction here."

This Court affirmed *per curiam* the dismissal of the complaint. *Bergen County* v. *United States*, 359 U.S. 27 (1959). That decision has never been overruled or even questioned by any Court.* It was properly followed by the trial court in the case at bar and by two other well-considered district court decisions which are squarely in point. *State of New Hampshire* v. *Boston & Maine Corp.*, 251 F. Supp. 421 (D.N.H. 1965); *State of Minnesota* v. *United States*, 238 F. Supp. 107 (D. Minn. 1965).

Appellants attempt to rebut the authority of *Bergen County* v. *United States, supra*, by two arguments. Neither can withstand analysis.

First, appellants suggest that this Court's *per curiam* affirmance, on the merits, of a lower Court decision upholding the propriety of a train discontinuation under Section 13a(1) somehow constitutes a holding on the jurisdictional question presented here. *City of Williamsport* v. *United States*, 282 F. Supp. 46 (Md.Pa. 1968), *affirmed per curiam* 392 U.S. 642 (1968). This contention is unsound for two reasons:

First, and most important, no party in the *Williamsport* case questioned jurisdiction in this Court. Therefore, the affirmance does not constitute a precedent on the question of jurisdiction. In *United States* v. *L. A. Tucker Truck-lines*, 344 U.S. 33 (1952), a case involving judicial review of an action of the Interstate Commerce Commission, this

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* Appellants now assert that they did not concede the correctness of the holding in *Bergen County* v. *United States*. Certainly they never contested the correctness of that decision in the trial court, nor do they now attack it directly. If such an attack were made, it would find no support in any existing decision.

Court rejected the type of argument made by appellants here stating (344 U.S. at page 38):

> ". . . The effect of the omission was not there raised in briefs or argument nor discussed in the opinion of the Court. Therefore, the case is not a binding precedent on this point. Even as to our own judicial power or jurisdiction, this Court has followed the lead of Mr. Chief Justice Marshall who held that this Court is not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed *sub silentio.*"

Second, the *City of Williamsport* case is factually distinguishable from the case at bar. In *City of Williamsport*, the Commission did not discontinue its investigation without taking any action. It required the carrier to continue operation of trains between Baltimore, Maryland and Harrisburg, Pennsylvania for the one-year period permitted by Section 13a(1), but declined to interfere with the discontinuance of the portion of the trains which operated between Harrisburg, Pennsylvania, and Buffalo, New York. Thus, the Commission had partially exercised its authority under Section 13a(1). It might be argued that this action made the entire proceedings and all issues in the case subject to judicial review. Certainly jurisdiction in *City of Williamsport* could be sustained on the basis of the particular facts of the case, even though the district court chose not to rely upon these factual differences.

Appellants also seek to distinguish *Bergen County* v. *United States, supra*, on the grounds:

(1) That in *Bergen County*, the Commission refused to investigate the discontinuance while in this case, an investigation was made but discontinued; and

(2) That no opinion or findings were issued by the Commission in *Bergen County,* while the Commission in the case at bar issued an opinion explaining its reasons for not interfering with the discontinuance.

Neither of these distinctions have any substance. In both *Bergen County* and the case at bar the parties objecting to a discontinuance were refused relief by the Commission and sought to appeal to the Courts. If any distinction could be made, the procedure in *Bergen County* of denying relief without an investigation or opinion would seem more objectionable than the careful and deliberate procedures followed by the Commission in the case at bar. Consequently the authority of the *Bergen County* case is a further answer to Appellants' contentions that the trial court "unfairly" denied them judicial review which would be available to others in like circumstances.

Appellants attempt to support their claim that denial of judicial review prior to investigation is proper, but improper after investigation, by a claim that this distinction is common in administrative law. However, as in the trial court, appellants can suggest only one example of this supposed common rule—that relating to reduced freight rates under Section 15(7) of the Interstate Commerce Act. This analogy has been argued before and was carefully considered and rejected in *State of New Hampshire* v. *Boston & Maine Corp.* 251 F. Supp. 421, 424-425 (D.N.H. 1965). The critical difference between Sections 13a(1) and 15(7) is that under Section 15(7) the Commission must determine the lawfulness of proposed rates before they finally become effective, whereas discontinuances under Section 13a(1) are self-implementing unless the Commission intervenes.

Appellants' alternative argument, emphasizing the distinction between a case in which the Commission issues an opinion and findings and the case where none are issued is equally unsound. This argument would make the right to judicial review dependent upon the voluntary and possibly arbitrary decision of the Commission as to whether to prepare or not prepare an opinion. This argument would suggest that Appellants would concede that a right to judicial review would not exist if the Commission had discontinued its investigation in the case at bar without issuing an opinion. Neither precedent nor common sense supports that theory.

The principles of *Bergen County* v. *United States, supra,* control the issues in this case and the authority of that decision requires affirmance here.

*The Commission's Attempts to Amend Section 13a(1).*

The Commission has attempted to induce Congress to enact an amendment to Section 13a(1), which would give parties objecting to discontinuance, the right to judicial review. This attempt to change the law by new legislation indicates that such judicial review is not provided in the existing form of the statute.

As we have already noted, the language and interrelated structures of Sections 13a(1) and 13a(2) preclude judicial review of Section 13a(1) discontinuances. Any change of such a fundamental nature would require a complete rewriting of the statute—a task properly left to Congress, rather than the courts.

*The Jurisdictional Statutes Relied Upon by Appellants are not Applicable In this Case.*

Appellants attempt to strengthen their case by claiming a right of judicial review under Section 1336(a) of the Judicial Code, providing for review of "orders" of the Interstate Commerce Commission (28 U.S.C. §1336(a)) and the Administrative Procedure Act (5 U.S.C. §§701-706), providing generally for the review of actions of administrative agencies. But in view of the matters already discussed, neither of these statutes is applicable in this case. Both were relied upon in *State of New Jersey* v. *United States,* 168 F.Supp. 324, 328-329 (D.N.J. 1958), *affirmed per curiam sub nom. Bergen County* v. *United States,* 359 U.S. 27 (1959), *supra,* which denied the existence of any jurisdiction for judicial review by objectors in such cases.

As was made clear in *State of New Jersey* v. *United States* (See p. 10, *supra*), the mere description of the Commission's action in this case as an "order" does not make the Commission's termination of its investigation an "order" as to which judicial review is available under Section 1336(a). As this Court held in *United States* v. *Los Angeles & S.L.R.R.,* 273 U.S. 299, 309-310 (1927):

> "The final report * * * called an order. But there are many orders of the Commission which are not judicially reviewable * * *.
>
> "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future

> status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

As for the Administrative Procedure Act, that statute expressly excepts from judicial review cases in which:

> "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." (5 U.S.C. §701).

Both of these exceptions are obviously applicable in the case at bar. The legislative purpose of Section 13a(1), the unusual procedures specifically prescribed by that section and the critical differences between the language and procedures under Section 13a(1) and those required under Section 13a(2) do spell out a legislative pattern which is inconsistent with the time-consuming procedures involved in judicial review. Also it is obvious that the exercise of the limited powers conferred upon the Commission under Section 13a(1) is left wholly to the discretion of the Commission. Consequently, the Administrative Procedure Act does not confer jurisdiction in this case. *State of New Jersey* v. *United States,* 168 F.Supp. 324, 329 (D.N.J. 1958), *affirmed sub nom. Bergen County* v. *United States,* 359 U.S. 27 (1959); *State of New Hampshire* v. *Boston and Maine Corp.,* 251 F.Supp. 421, 424-25 (D.N.H. 1965). No case has sustained jurisdiction to review a Section 13a(1) train discontinuance on the basis of the Administrative Procedure Act.

*Conclusion*

The decision of the lower court follows the only interpretation of Section 13a(1) which is consistent with the language and scheme of the statute and its legislative history. This decision, like the lower court decision in *State of New Jersey* v. *United States, supra,* should be summarily affirmed. Appellee has so moved, and its motion should be granted.

Respectfully submitted,

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Date: June 3, 1969.